A

HO KEN SENG v. PROGRESSIVE INSURANCE SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABDUL AZIZ RAHIM JCA
VARGHESE GEORGE JCA
B [CIVIL APPEAL NO: B-03-(IM)-82-2010]
14 OCTOBER 2014

BANKRUPTCY: *Creditor's petition – Presentation of – Creditor's petition filed in 1996 – Failure to extract – Re-filing of creditor's petition in 2004 – Granting of*
C *receiving and adjudication orders – Validity of – Whether act of bankruptcy occurred within six months before presentation of petition – Affidavit of truth of statement in petition – Whether reference made to creditor's petition filed in 1996 – Whether s. 131 Bankruptcy Act 1967 invoked – Whether petition defective*

D On 25 September 1996, a creditor's petition ('1996 CP') together with the affidavit of truth of statement in petition was filed by the respondent/judgment creditor ('JC'). The act of bankruptcy was deemed to have been committed by the appellant/judgment debtor ('JD') on 29 March 1996. Therefore, it was contended that the 1996 CP was filed within six months of the act of bankruptcy. However, between 1996 to 2004, the JC claimed
E that they could not extract the sealed copy of the creditor's petition from court despite various attempts since the court had misplaced the said petition and could not be traced. It was also claimed that the re-filing of the 1996 CP on 9 March 2004 ('2004 CP') was done on an express direction of the Shah Alam High Court. Therefore, a fresh affidavit of truth was affirmed and filed
F on 9 March 2004. On 28 September 2004, the 2004 CP and the affidavit were served on the JD. The Senior Assistant Registrar granted the receiving and adjudication orders ('RO & AO') and the High Court Judge dismissed the JD's appeal against the granting of the said RO & AO. Hence, this appeal. It was contended, *inter alia,* that (i) the 2004 CP did not comply with the
G Bankruptcy Act 1967 ('the Act'); (ii) the RO & AO ought not to have been granted based on the 2004 CP which was defective and/or invalid; and (iii) the 2004 CP was filed some eight years after the act of bankruptcy and was out of time.

Held (allowing appeal)

H **Per Varghese George JCA delivering the judgment of the court:**

(1) The date of presentation of the creditor's petition was recorded as 9 March 2004. It was manifest that the act of bankruptcy did not take place within six months of the presentation of the creditor's petition. Further, the annotation at the bottom of the creditor's petition was stated
I as "registered as creditor's petition no. 2996 of 2004". The "accompanying petition" referred in the affidavit could only have referred to the defective creditor's petition no. 2996 of 2004. If it was

the intention of the deponent to refer to the 1996 CP, then it would not be unreasonable to expect the JC to attach or exhibit a file copy of the same together with the said affidavit. (paras 15 & 20)

(2) It was incumbent upon the JC and their solicitors to ensure that the creditor's petition filed on 9 March 2004 reflected or was a copy of the 1996 CP. The affidavit filed on 9 March 2004 could have identified the 1996 CP with more particularity. Further, the JC's solicitors ought to have obtained a correction to the annotation "registered as creditor's petition no. 2996 of 2004" at the earliest opportunity to reflect the petition number in 1996 or at the least sought an order that the creditor's petition filed in 2004 was for all intent and purposes a copy of the 1996 CP. There were too many loose ends that could have been rectified by the JC but was left undone. (paras 21 & 22)

(3) The discrepancies highlighted in the 2004 CP could not bear out the JC's contention to the effect that what was re-filed in 2004 and served on the JD was the one and same creditor's petition filed in 1996. The 2004 CP showed significant areas of uncertainty and confusion. The creditor's petition relied upon by the JC to obtain the RO & AO was therefore defective and invalid. Further, s. 131 of the Act could not be invoked to save the defect or irregularities highlighted. Since the bankruptcy orders had penal consequences, the JD would suffer substantial injustice if the RO & AO was not set aside. (paras 23 & 24)

Bahasa Malaysia *Translation Of Headnotes*

Pada 25 September 1996, satu petisyen pemiutang ('PP 1996') bersama-sama dengan afidavit mengenai kebenaran pernyataan dalam petisyen telah difailkan oleh responden/pemiutang penghakiman ('JC'). Tindakan kebankrapan dianggap telah dilakukan oleh perayu/penghutang penghakiman ('JD') pada 29 Mac 1996. Oleh itu, adalah dinyatakan bahawa PP 1996 telah difailkan dalam masa enam bulan dari tindakan kebankrapan. Walau bagaimanapun, di antara tahun 1996 hingga 2004, JC menyatakan salinan meterai petisyen pemiutang tidak dapat diesktrak dari mahkamah walaupun pelbagai usaha telah dilakukan kerana mahkamah telah tersalah letak petisyen tersebut dan tidak dapat mengesannya. Juga dinyatakan bahawa pemfailan semula PP 1996 pada 9 Mac 2004 ('PP 2004') telah dibuat atas arahan Mahkamah Tinggi Shah Alam. Oleh itu, afidavit kebenaran baru telah diikrar dan difailkan pada 9 Mac 2004. Pada 28 September 2004, PP 2004 dan afidavit telah diserahkan kepada JD. Penolong Kanan Pendaftar telah membenarkan perintah penerimaan dan penghakiman ('RO & AO') dan Hakim Mahkamah Tinggi telah menolak rayuan JD berkenaan pemberian RO & AO tersebut. Oleh itu, rayuan ini. Dihujahkan, antara lain, bahawa (i) PP 2004 tidak mematuhi kehendak Akta Kebankrapan 1967 ('Akta'); (ii) RO & AO tidak sepatutnya diberikan berdasarkan PP 2004 yang cacat dan/atau tidak sah; dan (iii) PP 2004 yang difailkan kira-kira lapan tahun selepas tindakan kebankrapan adalah di luar masa.

Diputuskan (membenarkan rayuan)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Tarikh penyampaian petisyen pemiutang telah direkodkan sebagai 9 Mac 2004. Tindakan kebankrapan, dengan itu, tidak berlaku enam bulan dari penyampaian petisyen pemiutang. Tambahan, anotasi pada bahagian bawah petisyen pemiutang menyatakan "didaftar sebagai petisyen pemiutang no. 2996 tahun 2004". Petisyen yang disertakan yang dirujuk dalam afidavit hanya merujuk kepada petisyen pemiutang no. 2996 tahun 2004 yang cacat. Jika niat deponen adalah untuk merujuk kepada PP 1996, maka adalah munasabah untuk JC mengekshibit salinannya bersama-sama afidavit itu.

(2) Adalah penting untuk JC dan peguamcaranya memastikan bahawa petisyen pemiutang yang difailkan pada 9 Mac 2004 mencerminkan atau adalah salinan PP 1996. Afidavit yang difailkan pada 9 Mac 2004 sepatutnya menjelaskan PP 1996 dengan lebih terperinci. Tambahan, peguamcara JC sepatutnya membetulkan anotasi "didaftarkan sebagai petisyen no. 2996 tahun 2004" secepat mungkin untuk mencerminkan nombor petisyen 1996 atau sekurang-kurangnya mendapatkan perintah bahawa petisyen pemiutang yang difailkan pada tahun 2004 adalah salinan PP 1996. Terdapat banyak kelonggaran yang boleh diperbaiki oleh JC tetapi gagal dibuat.

(3) Percanggahan yang dinyatakan dalam PP 2004 tidak boleh mengesahkan hujahan JC bahawa apa yang difailkan semula pada tahun 2004 dan diserahkan kepada JD adalah petisyen pemiutang sama yang difailkan pada tahun 1996. PP 2004 menunjukkan ketidakpastian dan kekeliruan. Petisyen pemiutang yang disandar oleh JC untuk memperoleh RO & AO adalah cacat dan tidak sah. Malahan, s. 131 Akta tidak boleh dibangkitkan untuk membaiki kecacatan atau ketidakaturan yang dinyatakan. Memandangkan perintah kebankrapan mempunyai kesan menghukum, JD akan dibebankan dengan ketidakadilan substansial jika RO & AO tidak diketepikan.

Case(s) referred to:
J Raju M Kerpaya v. Kwong Yik Bank Bhd [2012] 1 CLJ 66 CA ***(refd)***
Mat Ripen Mat Elah v. Perwira Affin Bank Berhad [2005] 1 LNS 82 HC ***(refd)***
Normah Kassim Ex P Public Finance Bhd [2002] 4 CLJ 649 HC ***(refd)***
Re North; Ex Parte Hasluck [1895] 2 QB 264 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(1), 6, 131
Bankruptcy Rules 1969, r. 117

For the appellant - SS Muker (GK Ganesan & Daljeet Singh with him); M/s Daljeet S Sachdev & Co
For the respondent - M Menon; M/s Jaffar & Menon

[Editor's note: For the High Court judgment, please see Re Ho Ken Seng; Ex-parte: Progressive Insurance Sdn Bhd [2010] 1 LNS 1941.]

Reported by Kumitha Abd Majid

JUDGMENT

Varghese George JCA:

Introduction

[1] The notice of appeal filed on 9 April 2010 by the appellant – judgment debtor ('A/JD") was against two decisions of the High Court made on 11 March 2010. The decisions appealed from were:

(a) The dismissal by the High Court of A/JD's appeal (lampiran 26) against the order of the Deputy Registrar refusing to set aside the bankruptcy notice dated 8 August 1995; and

(b) The dismissal by the High Court of A/JD's appeal (lampiran 29) against the Senior Assistant Registrar's decision of 16 August 2007 granting the receiving and adjudication orders ("RO & AO") upon hearing the creditors' petition presented by the respondent-judgment creditor ("R/JC").

[2] Before us A/JD confined his appeal in respect of the High Court decision in (2) above only. Basically A/JD's contention was that the particular creditors' petition upon which the RO & AO had been granted was defective and/or invalid and the orders ought not to have been made against him on 16 August 2007.

Background

[3] The significant developments related to the subject matter of this appeal in chronological sequence were as tabulated below:

20 March 1990	–	R/JC obtained judgment against A/JD.
8 August 1995	–	Bankruptcy Notice (BN) was filed by R/JC.
9 January 1996	–	By Order of Court, the validity of the BN was extended and ordered to be served by substituted service on A/JD.
29 March 1996	–	Act of Bankruptcy deemed to have been committed by A/JD.
25 September 1996	–	A Creditors' Petition together with Affidavit of Truth of Statement in Petition was filed by R/JC in Court. This was within six months of the Act of Bankruptcy. (Official *Praecipe* was produced to confirm this filing)

1996 to 2004	–	R/JC claim that they could not extract for service the sealed copy of the 'Creditors' Petition' from the court despite various attempts. The explanation given by the court, according to R/JC, was that the Creditors' Petition had been misplaced in the court registry and could not be traced.
	–	R/JC state that in 2004 (that is some eight years later), their solicitors were asked to refile the Creditors' Petition and the Affidavit - utilising the same *praecipe*.
9 March 2004	–	R/JC refiled the Creditors' Petition and a fresh Affidavit as to Truth of Statement In Petition (affirmed also on that date).
28 September 2004	–	The refiled Creditors' Petition and Affidavit were served personally on the A/JD.
3 December 2004	–	Notice of Intention to Oppose Petition was filed and served by the A/JD.
28 February 2005	–	A/JD filed application to strike out the BN and Creditors' Petition.
8 January 2007	–	Deputy Registrar of Court dismissed the A/JD's application to strike out the BN and the Creditors' Petition.
12 January 2007	–	Appeal to Judge in Chambers against the decision of the Deputy Registrar was filed by A/JD. (A/JD application for stay pending disposal of this appeal was refused).
16 August 2007	–	RO & AO was granted by the Senior Assistant Registrar of Court.
22 August 2007	–	A/JD filed Notice of Appeal to Judge-in Chambers against the RO & AO.
11 March 2010	–	The learned High Court Judge dismissed both the appeals of the A/JD.
9 April 2010	–	A/JD lodged Notice of Appeal to the Court of Appeal against the decision of the Learned Judge of 11.03.2010.
11 November 2011	–	The appeal of A/JD came up for hearing at Court of Appeal. The Appeal was struck out (by a majority decision) on the ground that A/JD had not obtained 'sanction' to proceed with the appeal.
8 December 2011	–	A/JD filed for leave to appeal to the Federal Court.

21 November 2012	–	Federal Court heard A/JD's appeal.
10 January 2013	–	Federal Court allowed A/JD's appeal and ordered that the appeal be reheard by the Court of Appeal.
10 December 2013	–	Appeal heard by this Panel.

A/JD's Submisison

[4] The thrust of A/JD's contention was that in this matter there were two creditors' petition filed by the R/JC, namely the first one filed on 25 September 1996 (according to R/JC) ("1996-CP") and the other being the one filed on 9 March 2004.

The creditors' petition that was served on the A/JD was only the second one filed on 9 March 2004 ("2004-CP") together with the 'affidavit as to truth of statement in petition' affirmed on 9 March 2004.

[5] It was contended that the 2004-CP did not comply with s. 5 and s. 6 of the Bankruptcy Act 1967 ("BA 1967") and was accordingly defective and no RO & AO ought to have been granted based on the 2004-CP. More specifically, the 2004-CP was filed some eight years after the act of bankruptcy and was out of time.

[6] It was urged upon us to take particular note that the sealed copy of the 1996-CP, by the R/JC's own version of events, was not served on A/JD at all (due to it being misplaced or going missing in the court registry).

[7] In any event, even if the operative creditors' petition was to be the 1996-CP, there was no 'affidavit as to the truth' produced in respect of the 1996-CP. Further, any creditors' petition filed ought to have been served immediately or at the very least within 'reasonable time' not after a delay of eight years as was the case here.

[8] Since the purpose of the creditors' petition was to move the court to declare a person to be a bankrupt and since the consequences were quasi-penal, if not penal in nature, there ought to be strict compliance by the R/JC with the law. (*Re North; Ex Parte Hasluck* [1895] 2 QB 264).

It was urged upon us that any doubt or ambiguity that arose in that process or in any related papers, should be construed in favour of the party against whom the orders were being sought (here the A/JD).

R/JC's Contention

[9] The refiling of the 1996-CP in 2004 was done on express direction of the Shah Alam High Court. There were no two creditors' petition but only one namely the 1996-CP. The fresh affidavit of truth affirmed and filed on 9 March 2004 was similarly done on the instruction of the court and particularly referred to the Act of bankruptcy committed by A/JD of 29 March 1996.

[10] The 1996-CP was filed within six months of the Act of bankruptcy, together with an 'affidavit of truth of statement in petition' affirmed then, as evidenced by the *praecipe* for filing produced to court. Service of the 1996-CP could not be effected by factors beyond the control of R/JC.

[11] In any event the A/JD had not complied with r. 117 of the Bankruptcy Rule 1969 ("BRules") by giving the appropriate notice under Form 16 to oppose the 2004-CP.

[12] It should also be noted that there is no time deadline stipulated in the BA 1967 or the BRules 1969 before which the creditors' petition had to be served. On good authority of decided cases (both in the High Court and the Court of Appeal), there was also no requirement that the verification-affidavit was to be a condition precedent for the presentation of the creditors' petition, nor was it a requirement that such affidavit be served at all on the judgment debtor; the rationale being that such verification-affidavit was merely to enable the court to make appropriate orders on the creditors' petition. (*Normah Kassim Ex P Public Finance Bhd* [2002] 4 CLJ 649; *Mat Ripen Mat Elah v. Perwira Affin Bank Berhad* [2005] 1 LNS 82; the Court of Appeal in *J Raju M Kerpaya v. Kwong Yik Bank Bhd* [2012] 1 CLJ 66).

[13] Counsel for R/JC also drew our attention to s. 131 of the BA 1967 and contended that no proceeding in bankruptcy was liable to be invalidated even for any formal defect or irregularity unless the court was of the opinion that substantial injustice had been occasioned.

Our Observation And Decision

[14] The starting point for our consideration would be the creditors' petition that was served on the A/JD and based upon which the RO & AO were granted to R/JC on 16 August 2007. This was the 2004-CP. It was necessary to refer to this refiled 2004-CP in its entirety and accordingly we reproduce below the same for ease of reference:

IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN BANKRUPTCY NO. 29 - 2098 - 95

RE:	HO KEN SENG (NRIC NO. 8245195)	JUDGMENT DEBTOR
EX-PARTE:	PROGRESSIVE INSURANCE SDN BHD	JUDGMENT CREDITOR

CREDITORS' PETITION

We, PROGRESSIVE INSURANCE SDN BHD the Judgment Creditor of 9th, 10th and 15th Floors, Menara BGI, Plaza Berjaya, No. 12, Jalan Imbi 55100 Kuala Lumpur, hereby petition this Court that a Receiving Order and Adjudicating Order may be made in respect of the estate of HO KEN SENG (NO. K/P: 8245195) of No. 2, Jalan Jelai 3, Kawasan 6, Taman Kim Chuan, Pandamaran, 42000 Port Kiang, Selangor Darul Ehsan and lately residing at the aforesaid address and say:

1. That the said Judgment Debtor is domiciled in the Federation or in any state or within one year before the date of the presentation of the Petition has ordinarily resided or had a dwelling house or place of business in the Federation personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in the Federation by means of a partner or partners or an agent or manager.

2. That the said HO KEN SENG, the said Judgment Debtor is justly and truly indebted to us in the aggregate sum of RM2,835,179.38 made up inclusive of interest up to 08.08.1995 and costs obtained by PROGRESSIVE INSURANCE SDN BHD against the said HO KEN SENG, the said Judgment Debtor in the Kuala Lumpur High Court *vide* Suit No. D1-22-145-90 dated 20.03.90.

PARTICULARS OF AMOUNT CLAIMED

(a) Judgment sum	RM1,963,488.33
(b) Add interest at 8% per annum on RM1,963,488.33 from 22.1.90 until 08.08.95 (2025 days)	RM871,466.05
(c) Costs	RM225.00
	RM2,835,179.38

3. That we do not, nor does any person on our behalf hold any security on the said Judgment Debtor's estate, or any part thereof for the payment of the said sum.

4. That the said HO KEN SENG within six (6) Months before the date of the presentation of this PETITION has committed an act for Bankruptcy namely that the said HO KEN SENG has failed to comply with the requirements of the BANKRUPTCY NOTICE dated 08.08.1995 duly served on him by way of substituted service on the 12.03.1996 thereby committing an act of BANKRUPTCY on 29.03.1996.

Dated this day of 9 Mar 2004

Signed for and on behalf of the Judgment Creditor for its Authorised Agent

...
JOHARI BIN NORDIN
(NRIC NO: 580902-06-5393)
(PROGRESSIVE INSURANCE SDN BHD)

Signed by the Agent of the Judgment Creditor authorised in my presence

Signature of Witness } ...
} MURALEE MENON
} ADVOCATE & SOLICITOR
} KUALA LUMPUR

A } MESSRS JAFFAR & MENON
} UNIT 2-7-7 & 2-7-8, TINGKAT 7,
} MENARA KLH BUSINESS CENTER
} NO. 2 JALAN KASIPILLAY
} OFF JALAN IPOH
} 51200 KUALA LUMPUR
B Description } Advocates & Solicitors

ENDORSEMENT

This PETITION having been presented to the court on the 25 Sep 1996 day of 2004 it is ORDERED that this PETITION shall be heard at the
C High Court of Malaya at Shah Alam on the 15 Sep day of 2004 at 9.00 o'clock.

And you the said HO KEN SENG is to take notice that if you intend to dispute the truth of any of statements contained in the PETITION you must file with the Registrar of this court a notice showing the grounds upon which you intend to dispute the same and send by post a copy of
D the NOTICE to the Judgment Creditor **three (3) days** before the date fixed for hearing.

Dated this day of 25 SEP 1996

...
E SENIOR ASISTANT REGISTRAR
HIGH COURT SHAH ALAM

Registered as CREDITORS' PETITION NO. 2996 of 2004

...

F CLERK
HIGH COURT
SHAH ALAM

Kepada:

HO KEN SENG
(NRIC NO: 8245195)
G NO. 2, JALAN JELA1 3
KAWASAN 6, TAMAN KIM CHUAN
PANDAMARAN
42000 PORT KLANG
SELANGOR DARUL EHSAN

H This CREDITOR'S' PETITION is filed by MESSRS JAFFAR & MENON, solicitors for the Judgment Creditor abovenamed whose address for service is at Unit 2-7-7 & 2-7-8, Tingkat 7, Menara KLH Business Centre, No. 2, Jalan Kasipillay, Off Jalan Ipoh, 51200 Kuala Lumpur.

I Ruj: JM/L/0020(103)/94

No. Tel : 03-23811500
No Fax: 03-23811505

[15] The following need to be highlighted with reference to the contents or what is stated in the creditors' petition.

(a) The heading of this refiled 2004-CP appear to refer to the creditors' petition filed in 1996 (1996-CP) as follows:

> IN THE HIGH COURT OF MALAYA AT SHAH ALAM IN BANKRUPTCY NO. 29-2098-95

(b) At para. 2 the interest calculated on the judgment sum and claimed is made out to be up to 8 August 1995 only.

(c) At para. 4 it is stated that A/JD "... within six months before the date of the presentation of this Petition has committed an act of bankruptcy namely ...". The particulars of the BN and date of the Act of bankruptcy nevertheless coincided with R/JC's version of events subsequent to the judgment being obtained against A/JD.

(d) However, the date of presentation of this creditors' petition was recorded:

> Dated this day of - 9 MAR 2004, 2004.

It was manifest that the 'act of bankruptcy' relied upon by the R/JC did not take place within six months of the presentation of this creditors' petition on 9 March 2004.

(e) Moving on then to p. 3 of this creditors' petition in the part bearing the heading 'endorsement' it was stated:

> (i) This Petition having been presented to the court on 25 SEP 1996 day of 2004; and
>
> (ii) Dated this day of 25 SEP 1996 2004

In respect of (i) above the rubber-stamped date of '25 Sep 1996' seem to have been superimposed on another rubber stamped date which could be made out to be ' ... AR 2005'. In any event here and on the date of the endorsement itself, the year typed-in, ie, '2004' was not deleted.

(f) Most telling however was the further annotation at the bottom of p. 3 of the creditors' petition which read:

> Registered as Creditors' Petition No. 2996 of 2004 (emphasis added)

[16] In our assessment the materiality or significance of the discrepancies highlighted by us in (c) and (f) in the preceding para. 15 could not be downplayed or easily dismissed by the court.

[17] In para. 4 of the creditors' petition, it alludes to an act of bankruptcy committed by the A/JD within six months before the presentation of the petition and which date of presentation is borne out as '9 MAR 2004' just above where the signature for or on behalf of the R/JC was set out.

It was the R/JC's position always that the Act of bankruptcy was committed on 29 March 1996. If so this creditors' petition dated 9 March 2004 (by R/JC themselves) was filed in contravention of the provision of s. 5(1) of the BA 1967, the relevant part of which reads:

> 5. Condition on which creditor may petition,
>
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (a) ...
>
> (b) ...
>
> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and
>
> (d) ...

[18] Even if there was still any doubt whether what was filed in 2004 was a fresh creditors' petition or it was the refiled 1996-CP (as vehemently maintained by counsel for R/JC), in our view, this was put to rest, where in the further annotation by the 'Clerk High Court, Shah Alam' (at bottom of p. 3) it was stated "... Creditors Petition No. 2996 of 2004."

[19] We also make reference to the so called fresh 'affidavit of truth of statement in petition' affirmed on 9 March 2004, which is reproduced below for ease of reference:

> IN THE HIGH COURT OF MALAYA AT SHAH ALAM
> IN BANKRUPTCY NO. 29-2098-95
>
> RE: HO KEN SENG (NRIC NO. 8245195) JUDGMENT DEBTOR
>
> EX-PARTE: PROGRESSIVE INSURANCE SDN BHD JUDGMENT CREDITOR
>
> AFFIDAVIT OF TRUTH OF STATEMENT IN PETITION
>
> I, JOHARI BIN NORDIN (NRIC NO: 580902-06-5393) a Malaysian Citizen of full age and residing at No. 4, Jalan 14/27A, Seksyen 5, Wangsa Maju, 53300 Kuala Lumpur hereby solemnly affirm and say as follow:
>
> 1. I am the Assistant General Manager (Claims) of the Judgment Creditor abovenamed and am authorised to make this AFFIDAVIT on behalf of the Judgment Creditor.
>
> 2. That the statements in the accompanying PETITION are true to my personal knowledge.
>
> AFFIRMED by the abovenamed } JOHARI BIN NORDIN } on the 9 Mar 2004 } in Kuala Lumpur }

(Interpretation not required) } ...
JOHARI BIN NORDIN

...
COMMISSIONER FOR OATHS

This AFFIDAVIT OF TRUTH OF STATEMENT IN PETITION is affirmed on and filed on by MESSRS JAFFAR & MENON of Unit 2-7-7 & 2-7-8, Tingkat 7, Menara KLH Business Centre, No. 2, Jalan Kasipillay off Jalan Ipoh, 51200 Kuala Lumpur, Solicitors for the Judgment Creditor.

(RUJ: JM/L/0020(103)/94)
TEL : 03-23811500
FAX : 03-23811505

[20] The affidavit, no doubt was filed in 'in Bankruptcy No. 29-2098-95'. An 'accompanying petition' was referred to by the deponent at para. 2 of the affidavit and it could only have referred to the defective creditors' Petition No. 2996 of 2004 as shown above, filed on the same date with the said affidavit.

If it was the intention of the deponent to refer to the 1996-CP, then it would not be unreasonable to expect the R/JC to attach or exhibit a file-copy of the same (which surely would have been available with solicitors for R/JC in any event) together with this affidavit in question. There was none produced in this instance.

[21] In our view, it was incumbent upon R/JC and their solicitors to ensure that the creditors' petition filed on 9 March 2004, reflected or was a copy of the 1996-CP, if at all this court was to be sympathetic to their explanation that it was done at the behest of the Shah Alam High Court. The affidavit also filed on 9 March 2004 could have identified (as the accompanying petition) the 1996-CP with more particularity.

What was before us was therefore total indifference and a clear example of dereliction of responsibility on the part of the R/JC or its solicitors. This could not be condoned by the court.

[22] More importantly in our view, solicitors for R/JC ought to have obtained a correction to the annotation 'registered as creditors Petition No. 2996 of 2004' at the earliest opportunity to reflect the Petition No. in 1996 or at the least sought for an order of court that this creditors' petition filed in 2004 was for all intent and purposes a copy of the 1996-CP, before service of the 2004-CP was effected on the A/JD. There were too many loose ends that could have been rectified by R/JC but left undone.

[23] In the event, we were constrained to conclude that the discrepancies highlighted in the 2004-CP could not bear out the R/JC contention to the effect that what was refiled in 2004 and served on the A/JD was the one and same creditors' petition, filed in 1996 (the 1996-CP). There was on the face

of the 2004-CP significant areas of uncertainty and confusion which the High Court had overlooked and allowed to stand. The creditors' petition relied upon by the R/JC to obtain the RO & AO, in our assessment was therefore definitely defective and invalid and ought to have been so ruled by the Senior Assistant Registrar and the learned judge who heard the appeal.

[24] This was not a case, in our view, where s. 131 of the BA 1967 could be invoked by R/JC to save the defect or irregularities highlighted. Bearing in mind also that bankruptcy orders had penal consequences, we further held that the A/JD would suffer substantial injustice if the RO & AO granted on 16 March 2007 was not set aside. The very foundation upon which the RO & AO was obtained was unsustainable and no order to be made at this stage could remedy the same in any event.

[25] Accordingly we allowed the appeal unanimously.